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NO. 82-1111

IN THE

Supreme Court of the United States

October Term 1982

Marguerite Owens Harrell, by her Parents,
Allen W. Harrell and Irene Burk Harrell,
Petitioner,

v.

Wilson County Schools, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER ASSESSMENT, EVALUATION AND PLACEMENT PROCEDURES COMPLY WITH DUE PROCESS AND THE REQUIREMENTS OF THE EDUCATION OF THE HANDICAPPED ACT AND ITS FEDERAL REGULATIONS WHERE THE EVALUATION FORMS WERE ONLY PARTIALLY COMPLETED, INFORMATION WAS NOT OBTAINED WITH REGARD TO PRIOR EDUCATIONAL BACKGROUND OR FROM FORMER TEACHER, A CONTINUUM OF ALTERNATIVE PLACEMENTS WAS NOT CONSIDERED AND A BIASED STATE CONSULTANT WAS UTILIZED.

II. WHETHER AN INDIVIDUALIZED EDUCATION PROGRAM IS RESPONSIVE TO THE SPECIAL EDUCATIONAL NEEDS OF A HEARING IMPAIRED CHILD AS REQUIRED BY THE EDUCATION OF THE HANDICAPPED ACT AND ITS FEDERAL REGULATIONS WHERE THE STATEMENT OF EDUCATIONAL PERFORMANCE RELIED SOLELY ON THE TEST SCORE OF THE PEABODY INDIVIDUAL ACHIEVEMENT TEST, THE PERCENTAGE OF TIME SPENT IN THE REGULAR CLASSROOM AND WITH SUPPORT SERVICES WAS YET TO BE DETERMINED AND ONLY ONE OF THE SPECIAL SERVICES PROVIDERS HAD BEEN TRAINED TO WORK WITH HEARING IMPAIRED CHILDREN.

III. WHETHER A LOCAL SCHOOL SYSTEM COULD PROVIDE AN EDUCATIONAL PROGRAM WHICH WAS "APPROPRIATE" TO MEET THE SPECIAL EDUCATIONAL NEEDS OF A HEARING IMPAIRED CHILD PURSUANT TO THE EDUCATION OF THE HANDICAPPED ACT AND ITS FEDERAL REGULATIONS WHERE THE EVALUATION AND PLACEMENT PROCEDURES AND INDIVIDUALIZED EDUCATION PROGRAM DEVELOPMENT WERE MADE UPON UNLAWFUL PROCEDURES AND THE REGULAR CLASSROOM TEACHER AND ALL BUT ONE OF HER SPECIAL SERVICE PROVIDERS WERE NOT CERTIFIED TO TEACH CHILDREN WITH HEARING IMPAIRMENTS.

PARTIES

The parties to the proceedings in this action are Petitioner Marguerite Owens Harrell, by her parents Allen W. Harrell and Irene Burk Harrell, a child with special needs who seeks to have the Judgment of the lower courts reversed and Respondents Wilson County Schools, Dr. W.O. Fields, Jr., Superintendent and North Carolina Department of Public Instruction, Dr. A. Craig Phillips, Superintendent.

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OPINIONS BELOW

The judgment of the North Carolina Supreme Court is unpublished and is reproduced as Appendix B to Petitioner's Petition for Writ of Certiorari.

The opinion of the North Carolina Court of Appeals is reported at 58 N.C. App. 260, 293 S.E. 2d 687 (1982) and is reproduced as Appendix A of the Petition.

The judgment of the Wilson County Superior Court is unpublished and is reproduced as Appendix C of the Petition.

The decision of the State Review Officer is reproduced as Appendix D of the Petition. The decision of the Hearing Officer is reproduced as Appendix E of the Petition.

JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Constitution of the United States:

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within any jurisdiction the equal protection of the laws.

United States Code:

20 U.S.C. §1401, ***et seq.***

The pertinent text is reproduced as Appendix F to the Petition.

Code of Federal Regulations:

34 C.F.R. Part 300, ***et seq.***

The pertinent text is reproduced as Appendix G to the Petition.

STATEMENT OF THE CASE

Petitioner, Marguerite Harrell, was born 30 December 1964. At all times relevant to the pendency of this action she has been a legal resident of Wilson County, North Carolina. Her parents, Allen W. Harrell and Irene Burk Harrell, have also been residents of Wilson County, North Carolina, during that period. This child is hearing impaired. As such, she is a child with special needs entitled to receive a free

appropriate "public education under applicable federal and state statutes dealing with educational requirements for the handicapped." 20 U.S.C. § 1401, *et seq.*, N.C.G.S. 115-363 *et seq.*

At the time these proceedings were initiated, the child had never been enrolled in respondent school system. From 1973 until the time these proceedings were begun she was enrolled at the Central Institute for the Deaf (hereinafter CID) in St. Louis, Missouri. CID is a residential school which utilizes the "oral communication" method of teaching deaf students. The oral communication method does not involve finger spelling or sign language but it relies on speech reading and other receptive and expressive language skills. Prior to her enrollment at CID, petitioner attended "oral communication" programs both public and private, located in Durham and Cary, North Carolina. Petitioner briefly attended the Eastern North Carolina School for the Deaf in Wilson, North Carolina in 1972. The Eastern North Carolina School for the Deaf employs the "total communication" method of teaching. That method utilizes a combination of finger spelling, sign language, and an oral auditory approach. That method is inconsistent with the "oral" training the child has received.

On 17 July 1978 petitioner applied to respondent for an educational expense grant to procure funds to send the child to CID for the 1978-79 school year beginning in September 1978. (Exhibit S-13)

Respondent conducted a multi-disciplinary evaluation and diagnosis of the child to determine what was necessary to furnish her with an appropriate educational program. She was assessed in all areas related to her disability. Respondent conducted conferences on 11, 14, and 22 August 1978 with regard to the issue of the child's needs. Petitioner's parents and various educational experts participated in these conferences.

Thereafter, respondent developed an individualized education program (hereinafter IEP) for the child. This IEP included an "oral communication" education program in a regular sixth grade class with support services of speech therapist, resource teacher, psychologist, and classroom aide. The use of a phonic ear and its accessories were also proposed for use in the child's IEP.

Respondent found that an appropriate program could be provided for the child locally in the Wilson County schools. Therefore, it denied petitioners' request for an educational expense grant. Despite this determination, the child attended CID during the 1978-79 school year.

Respondent did not initiate or approve of the placement of the child at CID. Respondent was at all times willing to provide the child a free and appropriate education. Respondent prepared an IEP for the child which was never implemented because the child was never enrolled in the Wilson County schools but returned to CID.

In September 1978 petitioner initiated proceedings under the due process provisions of the federal and state statutes governing the education of the handicapped. 20 U.S.C. §1415; N.C.G.S. 115-179.1. Petitioner contended that respondent had not offered the child an appropriate education, but that CID was the appropriate placement for her. Therefore, she argued, respondent had wrongfully denied the application for an educational expense grant. At petitioners' request, a hearing with regard to this matter was conducted at the local level on 11 October 1978 before Mr. George S. Willard, hearing officer. On 6 November 1978 the hearing officer issued his hearing decision in which he concluded that an appropriate educational program had been developed and offered to the child by resondent in compliance with federal and state laws. (R.p. 101)

Subsequently, petitioner appealed from the local hearing officer to the State Education Agency pursuant to

N.C.G.S. 115-179.1(b) and 20 U.S.C. §1415(c). This appeal was heard by State Review Officer Lowell Harris on 20 December 1978. Following this hearing Mr. Harris issued a state review decision in which he upheld the decision of the local hearing officer. (R.p. 124) He stated his opinion that respondent could and was willing to provide the child with a program that was appropriate to meet her special educational needs. (R.p. 132)

Petitioner appealed the decision of the State Review Officer to the Wilson County Superior Court in accordance with N.C.G.S., Chapter 150A, Article 4. Judgment was entered on 2 March 1981 upholding the decision of the State Review Officer.

Petitioner filed notice of appeal from the Wilson County Superior Court to the North Carolina Court of Appeals on 9 March 1981. On 20 July 1982, the North Carolina Court of Appeals affirmed the decision of the Superior Court.

From the decision of the Court of Appeals the petitioner filed notice of appeal and petition for discretionary review in the North Carolina Supreme Court. Further review was denied by that Court on 7 October 1982. This Petition followed.

Subsequent to the initiation of these proceedings, the child was enrolled in respondent school system on 2 September 1980. She has been in regular attendance in respondent school system since that date and has functioned well.

REASONS FOR DENYING THE WRIT

The respondents urge the Court to deny the Petition for the reasons hereinafter set forth.

I. DUE PROCESS CLAIM

The petitioner contends that during the assessment, evaluation and placement of the child, the school system did not comply with due process of the applicable federal and State regulations, thereby denying petitioner a free appropriate public education as required by law. Respondents strongly urge you to dismiss this claim.

This Court has addressed the requirements which must be met by states to comply with the Education for All Handicapped Children Act, (hereinafter Act) 20 U.S.C. §1401 *et seq.*, in the case of *Board of Education v. Rowley*, ____ U.S. ____, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982). The *Rowley* Court set forth the issues which must be considered by a court reviewing the state administrative findings and decisions in a civil action pursuant to 20 U.S.C. §1415(e) (2). A review of the record and the previous decisions in the case *sub judice* clearly shows that the guidelines for review have been followed and the petitioner is not entitled to any further relief.

In *Rowley* the Court directed that judicial review of administrative actions is limited to two questions.

> "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more." 73 L. Ed. 2d at 712.

The answer to both of these questions is yes. The State complied with the procedural requirements of the Act and the IEP was reasonably calculated to enable the child to receive educational benefits.

In order to qualify for assistance under the Act, a State must demonstrate that it "has in effect a policy that assures all handicapped children the right to a free appropriate public education." 20 U.S.C. § 1412(1). The "free appropriate public education" required by the Act is tailored to the unique needs of the handicapped child by means of an "individualized educational program" (IEP). 20 U.S.C. § 1401 (18). The IEP is prepared at a meeting between qualified representatives of the local educational agency, the child's teacher, the child's parents or guardian, and, where appropriate, the child. 20 U.S.C. § 1401 (19). The IEP is a written document containing:

> "(A) a statement of the present levels of educational performance of the child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such service, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved." 20 U.S.C. § 1401 (19).

A "free appropriate public education" is defined by the Act as

> "special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C)

include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with their individualized education program required under Section 614 (a) (5)." 20 U.S.C. § 1401 (18).

North Carolina has in place a policy that assures all handicapped children the right to a "free appropriate public education." N.C.G.S. 115C-106.[1] The IEP prepared for

[1] §115C-106. *Policy.*

(a) The General Assembly of North Carolina hereby declares that the policy of the State is to ensure every child a fair and full opportunity to reach his full potential and that no child as defined in this section and in G. S. 115C-122 shall be excluded from service or education for any reason whatsoever. This policy shall be the practice of the State for children from birth through age 21 and the State requires compliance by all local education agencies and local school administrative units, all local human resources agencies including, but not limited to, local health departments, local social service departments, community mental health centers and all State departments, agencies, institutions except institutions of higher education, and private providers which are recipients of general funds as these funds are defined in G.S. 143-1.

(b) The policy of the State is to provide a free appropriate publicly supported education to every child with special needs. The purpose of this Article is to (i) provide for a system of special educational opportunities for all children requiring special education, hereinafter called children with special needs; (ii) provide a system for identifying and evaluating the educational needs of all children with special needs; (iii) require evaluation of the needs of such children and the adequacy of special education programs before placing children in the programs; (iv) require periodic evaluation of the benefits of the programs to the children and of the nature of the children's needs after placement; (v) prevent denials of equal educational opportunity on the basis of physical, emotional, or mental handicap; (vi) assure that the rights of children with special needs and their parents or guardians are protected; (vii) ensure that there be no inadequacies, inequities, and discrimination with respect to children with special needs; and (viii) bring State law regulations, and practice into conformity with relevant federal law. (1973, c. 1293, ss. 2-4; 1975, c. 563, ss. 1-5; 1977, c. 927, ss. 1, 2; 1979, 2nd Sess., c. 1295; 1981, c. 423, s. 1.)

Marguerite Harrell was the result of several conferences with input from various educational professionals and the parents of the child. See, R. p. 108. The IEP includes the requisite goals and objectives required by 20 U.S.C. § 1401 (19) and 34 C.F.R. 300.346 (1978). The proposed educational program to be offered by the Wilson County schools was to be provided at public expense, at no cost to the parents, in accordance with standards set by the state educational agency and in conformity with the specially tailored IEP. It is clear that the school system complied with applicable statutes and regulations in this matter.

The petitioner further argues that she was denied due process of law because she was not provided with a fair tribunal. Specifically she argues that Mildred Blackburn, a hearing consultant for programs for the hearing impaired in the public schools of North Carolina was biased against residential placements and thereby exerted undue influence on the placement committee's decision.

Due process requires that an individual receive adequate notice and be given an opportunity to be heard. This requirement applies to administrative agencies performing adjudicatory functions. *Goldberg v. Kelly,* 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970). "A fair trial in a fair tribunal is a basic requirement of due process." *In Re Murchison,* 349 U.S. 133, 136, 99 L. Ed. 942, 946, 75 S. Ct. 623, 625 (1955). There is no question that notice requirements of due process were met in this case. In fact, the petitioner stipulated that due process procedures had been followed prior to and during the hearing of this matter before the local hearing officer (R.pp. 101-103). Petitioner's claim that the "bias" of Mildred Blackburn resulted in a denial of due process is ludicrous.

The mere fact that a member of the panel which developed the IEP had expressed a certain professional

opinion on main streaming versus residential placement does not result in a violation of due process. Compare *Trade Commission v. Cement Institute,* 333 U.S. 683, 92 L. Ed 1010, 68 S. Ct. 793 (1948) and *Hortonville District v. Hortonville Education Association,* 426 U.S. 482, 49 L. Ed. 2d 1, 96 S. Ct. 2308 (1976) where the degree of involvement or possible bias was more substantial and the Court rejected the claims of bias. Petitioner's claim should be dealt with in the same manner.

II. THE IEP CLAIM

The petitioner contends that the IEP developed for Marguerite was unresponsive to her needs because the statement of educational performance relied solely on the Peabody Individual Achievement Test and that the IEP is incomplete because the percentage of time to be spent with support services was yet to be determined.

The IEP in this case was developed between 22 August and 28 August 1978. The initial request for an educational expense grant was not made until 17 July 1978 for the 1978-79 school year. Under the circumstances of this case the school board acted diligently and in good faith in evaluating Marguerite's needs and in developing the IEP within this relatively short period of time. The North Carolina Court of Appeals made specific and detailed findings regarding the school system's compliance with applicable statutes and regulations. See Petition Appendix A, pp. 55-69. The Wilson County Schools followed all the procedures required by the Act and petitioner's allegations of incompleteness and improper procedures are an attempt to grasp at straws. The respondents strongly urge the Court to deny the petition on the basis of this claim.

III. APPROPRIATE EDUCATION CLAIM

The petitioner's final claim is that the Wilson County schools could not provide an "appropriate" educational program because it was based on unlawful procedures and because the regular classroom teacher and all but one of her special service providers were not certified to teach children with hearing impairments. For the reasons outlined above and those that follow, this claim is without merit.

Justice Rehnquist delivering the opinion of the *Rowley* Court stated:

> "According to the definitions contained in the Act, a 'free appropriate public education' consists of educational instruction specifically designed to meet the unique needs of the handicapped child, supported by such unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction.... Thus if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional check list are satisfied, the child is receiving a 'free appropriate public education as defined by the Act.'
> 73 L. Ed. 2d at 701

The program designed in the case *sub judice* provided for personalized instruction with sufficient support services to enable the child to benefit from the instruction. This Court made it very clear in *Rowley,* which also involved a hearing impaired child, that the requirement that a state provide specialized educational services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children. The requirement of the Act is an appropriate education, not the best education possible.

The school system offered the petitioner an appropriate education to meet her unique individual needs. All procedures mandated by the Act were followed. The decision of the North Carolina Court of Appeals in this regard should be affirmed.

CONCLUSION

The North Carolina Supreme Court was correct in denying further review of the decision of the North Carolina Court of Appeals in this case. Based upon this Court's decision in *Rowley* a complete denial of the Petition for Certiorari is the correct result. There is nothing of substance for this Court to review.

This the 2nd day of February, 1983.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI was served this day upon counsel for petitioner, by depositing three copies of said brief in the United States Mail, postage prepaid, addressed as follows:

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This the 2nd day of February, 1983

Kaye R. Webb
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